(4)

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals Of Tennessee At Knoxville

BRIEF FOR THE PETITIONER

W. J. MICHAEL CODY
Attorney General of Tennessee
Counsel of Record

ROBERT A. GRUNOW
Associate Chief Deputy
Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

38 pp

QUESTION PRESENTED

Whether the introduction of a nontestifying accomplice's "interlocking" confession, on rebuttal, solely to impeach the defendant's claim that his own confession was a coerced imitation of the accomplice's, violated the defendant's right to confrontation of witnesses against him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions, Statutes and Rules:

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court of
Criminal Appeals Of Tennessee At Knoxville

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee at Knoxville reversing the respondent's conviction (Pet. App. A-1 - A-12) is reported at 674 S.W.2d 741. The order of the Supreme Court of Tennessee at Knoxville denying discretionary review under Tenn. R. App. P. 11 (Pet. App. A-13) is not published, but is noted at 674 S.W.2d 741.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on January 25, 1984. Discretionary review was sought in the Supreme Court of Tennessee, and was denied on April 30, 1984 (Pet. App. A-13). The petition for a writ of certiorari was filed on June 29, 1984, and was granted on October 29, 1984. ____

U.S. ____, 105 S.Ct. 321. Jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ..

STATEMENT OF THE CASE

The victim, 72-year-old Ben Tester, was last seen alive walking toward his house in Hampton, Tennessee, at about 8:45 p.m. on August 26, 1981. (J.A. 9.) His body was found the next day, hanging by a nylon rope from an apple tree in his back yard.

Respondent Harvey J. "Joe" Street, a juvenile at the time of the murder, was transferred to the Criminal Court of Carter County to be tried as an adult. (J.A. 3.) He was indicted jointly with several others (but not including Clifford Peele, who was charged separately), charged in a single count with murder in the first degree, both premeditated and during the commission of a felony.[1] (J.A. 4-5.) Street's case was severed from those of

---

[1] Tenn. Code Ann. § 39-2-202(a):

> Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

Punishment is death or life imprisonment. Tenn. Code Ann. § 39-2-202(b). Effective April 1, 1982, however, a juvenile transferred for trial as an adult cannot receive a sentence of death. Tenn. Code Ann. § 37-1-134(a)(1); 1982 Tenn. Pub. Acts, ch. 637.

the other defendants, and the venue was changed to Unicoi County. (J.A. 4, 6.) A motion to suppress a statement made by Street on September 17, 1981 was denied after a pretrial hearing.[2] (J.A. 7.) On the second day of trial, the trial court ordered that Clifford Peele be transported to and held at the Unicoi County Jail. (J.A. 7-8.)

The State's case in chief at trial rested primarily on Street's confession of September 17, 1981. Agent Don Collins of the Tennessee Bureau of Investigation testified that he took the statement and reduced it to handwriting, correcting it as Street directed. (J.A. 24, 26-28, 50-58, 64-66.) Street had been advised of and had waived his rights, and his father was present throughout the questioning; Street did not want his mother present. (J.A. 22-24, 43-45.) An assistant district attorney present during the questioning told Street three times that he was free to go home any time he wished, and he was permitted to leave after making the statement. During the questioning, he told Agent Collins two or three times to hurry up so he could go home. (J.A. 28-29, 46-48.) The statement was read to the jury, and Agent Collins' handwritten original (with Street's corrections and signature) was introduced into evidence. (J.A. 25-26.)

According to the statement (J.A. 353-360), Street and Clifford Peele planned the burglary of Tester's house, based on Street's information that Tester would be at church that night and had $10,000 in cash in the house. At one point, Peele asked Street if he was "willing to do [his] part" if Tester came in during the burglary, i.e., help to "whip" or "kill" Tester; Street responded that he was not. During the course of the day, and on Peele's instructions, Street recruited Eugene Montgomery and Jeff Causby to assist in the burglary, and gave some money to Tiny Bailey to buy a white nylon rope.

---

[2] Street appealed the admissibility issue to the Tennessee Court of Criminal Appeals, which held that the trial court's findings of a knowing waiver and voluntariness were supported by the record. (Pet. App. A-4 - A-6.) Street did not appeal this issue to the Tennessee Supreme Court.

Between 9:00 and 9:30 p.m., the four young men drove to Tester's unlighted house in a stolen pick-up truck. A window to the right of the front door was open, and the burglars cut the screen completely out with a Double-X knife Street had stolen earlier in the day. The burglars entered the house and began to search it; the telephone wire was cut and a light was turned on. After 10 or 15 minutes, Peele warned that someone was coming, and Tester walked in the front door. Peele wrestled with Tester, who eventually quit struggling. Peele then ripped open Tester's shirt searching for the money. Street claimed that he then ran out to the truck, followed by Peele, whom he urged to flee with him. Peele got the rope out of the truck and said, "No, we're going to string him up." Montgomery came outside and agreed.

The statement further related that they went back into the house, where Street made a gag from a sheet and put it in Tester's mouth (after being threatened by Montgomery). Peele requested that a pillow be brought to smother the victim, but when Montgomery appeared with a pillow Peele said it was not needed. Montgomery emptied Tester's wallet and threw it into the right front bedroom. Montgomery and Peele carried Tester outside and laid him on the tailgate of the truck, which Peele then backed to the tree. Street and Peele got up in the truck while Montgomery climbed into the tree to affix the rope. Peele tied loops in the rope and put them around Tester's neck (at which point Causby fled on foot), and Peele and Montgomery eased Tester off the tailgate. Street kept urging them to get out of there, and they left in the truck. At the close of the statement, Street said that some shirts and a sheet removed from Tester's house were later thrown off a cliff, and that Montgomery had stolen some checks, one of which was cashed.

Street made two other incriminating statements which were described to the jury. On November 23, 1981, while incarcerated at the Carter County Jail, Street told an officer that he needed to see the sheriff, since he knew the location of the

white truck which had the clothes in it that had come from Tester's house. (J.A. 84-86.) On June 27, 1982 Street gave a statement to the sheriff and two other men. Street identified a truck as the one used in the hanging, and admitted that he had placed the second loop of the rope around Tester's neck, having been compelled to do so by his uncle, Kelly Banner. (J.A. 74-76.)

The remainder of the State's proof in chief tended to corroborate Street's primary confession. Agent Collins and the victim's son investigated the scene, finding that the window screen had been cut with a knife and partially torn, a light in the house had been turned on, and the telephone wire had been cut. (J.A. 10-11, 17, 20; R. III, 220.) The house had been ransacked, shirts were missing from a bedroom closet, buttons from the victim's ripped shirt were found on the floor, a small pillow was lying near the entrance to the living room, and the victim's empty wallet was lying on the floor of the right front bedroom. (J.A. 11-12, 15, 18-20.) A torn sheet in the house matched the gag found in the victim's mouth. (J.A. 16, 29.) The victim was hanging by a white nylon rope tied in a double loop, and bits of grass on the limb from which the victim was hanging indicated that someone had climbed into the tree. (J.A. 14-16.)

In cross-examining Agent Collins, defense counsel brought out the fact that Clifford Peele had made a "confession" on September 16, 1981, the day before Street's main confession. (J.A. 30-32, 50.) Defense counsel attempted to introduce Peele's confession into evidence, but the State's hearsay objection was sustained. (J.S. 40-42.) Agent Collins denied that Peele's confession or any other information had been used to suggest to Street the contents of his own confession; in fact, Street included in his confession details which the officers knew were inconsistent with other information they had received. (J.A. 50-58, 64-66.)

The defense proof began with a string of alibi witnesses who attempted to account for Street's whereabouts throughout the

night of the murder. This proof, however, contained several contradictions. For example, two girls testified that they spoke with Street by telephone at a pool hall until 9:30 p.m., but also that at the end of the call they spoke with another youth who testified that he left the pool hall at 8:00 p.m. (J.A. 131-132, 134-138, 141-144.) Few of the witnesses were able to testify to Street's actual whereabouts at the time of the burglary and murder.

Street also testified in his own behalf, recanting his confession and denying any connection to or knowledge of the burglary or murder. Street stated that on several occasions Sheriff Papantoniou had taken Street into custody and questioned him about the murder, although Street could not recall whether he was under arrest at the time of the September 17, 1981 confession. (J.A. 186-188.) On that evening he was alone with the sheriff before the other officers arrived, and the sheriff threatened that he would see that Street received stiff penitentiary sentences on certain juvenile offenses unless Street confessed to the murder. The sheriff also allegedly promised that if Street confessed, he could go home that night and would be made a trustee while serving his sentences in the Carter County Jail. (J.A. 188-190, 192, 196, 228-229.)

Feeling that he had to confess to avoid the penitentiary,[3] Street decided to give a "confession" in which he deliberately falsified or concocted various details. He supposedly reasoned that the officers would investigate these details and, upon finding them to be false, would reject the entire statement as unreliable. (J.A. 194-195, 217-221, 234-235, 240-241.)

---

[3] Despite a long history as a juvenile offender, Street claimed he did not know a juvenile could not be sentenced to the penitentiary without first having been transferred to criminal court to be tried as an adult. (J.A. 222-224.)

Certain details (which the proof showed to be accurate) had, according to Street, been fed to him by the officers, particularly Sheriff Papantoniou. The sheriff had earlier read to Street several times the statement made by Peele the day before, and Street admitted on direct examination that Peele's statement implicated Street. (J.A. 190-191, 221, 224.) Several times during Street's confession the sheriff would read from Peele's statement and insist that Street say something similar. If Street deviated from Peele's account in any particular, the sheriff would halt the proceedings, accuse Street of lying, and insist that Street adopt Peele's or the sheriff's version. (J.A. 194, 202, 203, 217-221, 225-226, 239-250.)

Street also testified that the circumstances of the confession were generally oppressive. His father had left immediately after signing the interrogation form, and the officers refused Street's requests for the presence of his mother or an attorney. (J.A. 192-193, 205-206, 226-227.) Street simply denied making either of the other two incriminatory statements. (J.A. 196-200, 203-204, 235-239.)

The State presented rebuttal proof including three witnesses whose observations on the night of the murder tended to impeach Street's alibi defense. (J.A. 253-265.) A police officer testified about a statement begun by Street two days after the murder, but cut off on the request of Street's attorney. (J.A. 208-213, 265-268.)

Also in rebuttal the State called Sheriff George Papantoniou, who began by testifying about his conduct at the times of Street's various statements. The sheriff specifically denied leading or suggesting facts to Street during the September 17, 1981 confession, and denied Street's other allegations about the taking of the statement. (J.A. 271-277, 288-291, 305-310, 311-314.)

An evening recess was taken, and on the following morning the State moved for introduction into evidence of Peele's September 16, 1981 confession. The State argued that the con-

fession was not being offered for the truth of the matters stated therein, but instead to impeach Street's account of his own confession by showing that Street had confessed to details which were not contained in Peele's confession. After extended argument, the trial court allowed Peele's confession into evidence. (J.A. 281-288, 292-295.)

Before the confession was read into evidence, the trial judge twice instructed the jurors as follows:

> Objection is overruled, but ladies and gentlemen of the jury, I want to explain that the Court is - - is allowing the introduction of Mr. Peele's statement not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only as to other proof that might have been offered.

(J.A. 292, 293.) The statement was then read into evidence by the sheriff (J.A. 295-303), and it was introduced both in handwritten and typewritten forms (J.A. 290-291; R. XVIII, Ex. 42).

Peele's account of the burglary and murder was generally similar to Street's, but, as the State emphasized, there were several direct contradictions between the statements, and Street's statement contained several details absent from Peele's. For example, Peele said that a Triple-X knife had been used to partially cut the window screen, while Street had described a Double-X knife that had been used to completely cut out a portion of the screen. (J.A. 300, 357.) Peele's statement said nothing about any lights being turned on, the telephone wire being cut, the victim's shirt being ripped open, the victim's wallet being emptied and thrown into the right front bedroom, shirts stolen from the house, or the fact that the rope was made of white nylon. (J.A. 300-302, 303-304.) With respect to the hanging itself, Peele's confession stated that all four burglars had carried Tester outside, and that Montgomery and Causby stayed in the tree while Street and Peele together put the loops around Tester's neck and lifted Tester off the tailgate. (J.A. 302.)

Finally, the State presented another T.B.I. agent who was present during portions of Street's September 17, 1981 statement, and who also testified contrary to Street's version of how the statement was obtained. (J.A. 324-334.)

In closing argument, counsel for the State referred to Peele's confession only to argue that it impeached Street's claim that he had been coerced to imitate it. (J.A. 334-336, 340-344.) During the final instructions, the trial judge again cautioned the jurors that Peele's statement "can be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." (J.A. 350.) The jury found Street guilty of murder in the first degree, without specifying premeditated or felony murder, and sentenced Street to life imprisonment, the only possible punishment for the offense. (J.A. 8.)

After first finding that Street's September 17, 1981 confession was properly admitted into evidence, the Tennessee Court of Criminal Appeals reversed the conviction, finding constitutional error in the introduction of Peele's confession. (Pet. App. A-1 - A-12.) The court agreed that the confession was not hearsay, but found that the trial court's limiting instructions were "ineffective to correct denial of defendant's right to confrontation" of Peele. In response to the State's argument that the two confessions "interlocked," the court indicated doubt as to whether the "Interlocking Confessions Doctrine" applied to severed trials, and in any event held that the confessions did not "interlock" since Peele's confession made Street "much more a principal actor in the burglary and hanging" than had Street's own confession. Finally, the court refused to find harmless error.

SUMMARY OF ARGUMENT

In *Bruton v. United States,* 391 U.S. 123 (1968), this Court held that a codefendant's confession incriminating a nonconfessing defendant cannot be introduced into evidence at a joint trial without violating the defendant's right to confrontation. Even though the damaging confession had not been technically introduced against the defendant, and the jury had been instructed to consider it only against the codefendant, the Court found that the jury could not be presumed to have ignored the confession in determining the defendant's guilt or innocence.

The Court had faced a similar situation in *Douglas v. Alabama,* 380 U.S. 415 (1965), in which the highly incriminating statement of the previously-convicted accomplice was read to the jury in the guise of cross-examination of the accomplice, who had refused to testify. Even though the statement was technically not in evidence, the Court found the danger of consideration of the confession by the jury to be too great to permit such a procedure without cross-examination of the declarant.

Bruton and *Douglas* do not establish a rigid rule under the Confrontation Clause which bars introduction of a codefendant's confession. Instead, the cases should be read to hold only that, under the factual circumstances presented, a jury is unable to ignore the codefendant's implication of the defendant. Those factual circumstances included a codefendant's confession wholly inadmissible against the defendant for any evidentiary reason; a defendant who had not confessed and did not testify at trial, maintaining innocence throughout the proceedings; and a codefendant's confession which was "devastating" to the defendant's case and added "critical weight" to the prosecution.

The instant case presents very different factual circumstances from either *Bruton* or *Douglas,* and the holdings of those cases simply do not apply here.

First, the accomplice's confession in the instant case was admissible against the respondent as a matter of state law, because it was relevant and was not hearsay, as it was not admitted to prove the truth of the matters asserted therein. Thus it was far easier for the jury to limit its consideration of the confession as instructed by the trial judge than for the juries in *Bruton* and *Douglas* to completely ignore the confessions spread before them. Furthermore, because the wording and contents of the accomplice's confession, and not its truth, had become the relevant inquiry, there would have been no utility in cross-examining the accomplice himself.

Second, the respondent "opened the door" to introduction of the accomplice's confession by testifying that he had been forced to imitate it when he made his own statement. By doing so, the respondent seriously challenged the truth-finding function of the trial, and the State's interest in presenting contrary evidence increased in relation to the danger that the jury would wrongfully consider the accomplice's confession for its truth.

Third, the accomplice's confession "interlocked" with the respondent's own admissions in such a manner that the accomplice's confession was no longer "devastating" to the respondent's case. The respondent had given statements to the authorities admitting that he had willingly planned and participated in the burglary of the victim's house. He had also admitted that he gagged the victim, accompanied the other burglars as the victim was carried out to a pick-up truck, and got up in the truck and assisted by placing at least one loop of rope over the victim's head. These admissions certainly established the respondent's guilt of felony murder, aiding and abetting premeditated murder, or being a principal to premeditated murder, all of which constitute first-degree murder in Tennessee, with life imprisonment the only possible punishment.

ARGUMENT

THE INTRODUCTION OF THE ACCOMPLICE'S CONFESSION, TO IMPEACH AND REBUT THE RESPONDENT'S TESTIMONY THAT HE HAD BEEN FORCED TO IMITATE IT, DID NOT VIOLATE THE RESPONDENT'S RIGHT TO CONFRONTATION.

In *Bruton v. United States,* 391 U.S. 123 (1968), Bruton and codefendant Evans were jointly tried on a charge of armed postal robbery. The government's case in chief included evidence of Evans' oral confession to the crime, which implicated Bruton. Because the confession was hearsay and therefore inadmissible as to Bruton, the jury was instructed to consider it only against Evans. Neither defendant testified, and both were convicted. The Court of Appeals for the Eighth Circuit affirmed Bruton's conviction, relying on the holding of *Delli Paoli v. United States,* 352 U.S. 232 (1957), that jurors could be presumed to have followed the limiting instruction in such cases.

This Court reversed Bruton's conviction, overruling *Delli Paoli,* in an opinion grounded not on an interpretation of the Confrontation Clause, but rather on an analysis of the jurors' ability to follow the limiting instruction.[4] Relying on the more recent decision in *Jackson v. Denno,* 378 U.S. 368 (1964), the Court held that a jury cannot be relied upon to ignore a confession of guilt, even if the confession is made by a codefendant. 391 U.S. at 128-131. The Court conceded that there are "many circumstances" in which reliance on the jury's ability to follow a limiting instruction is justified, but held that in the factual context of Bruton's trial, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135.

[4] "If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor." 391 U.S. at 126.

In reviewing that factual context, the Court stressed that Evans' confession was "powerfully incriminating" in a manner "devastating" to Bruton, and that any accomplice's attempt to shift blame to others renders his or her statements intolerably unreliable in the absence of testing by cross-examination. 391 U.S. at 135-136.[5] Subsequent cases suggesting that violations of *Bruton* may be harmless also stressed the weight of the codefendant's statements in relation to the weight of independent evidence of the defendant's guilt. *See Harrington v. California,* 395 U.S. 250 (1969); *Schneble v. Florida,* 405 U.S. 427 (1972).

Three years prior to *Bruton* the Court had faced a similar problem in *Douglas v. Alabama,* 380 U.S. 415 (1965), in which codefendant Loyd's highly incriminatory confession was read aloud in the form of cross-examination of Loyd, who had already been found guilty in a separate trial but was refusing to answer questions at Douglas' trial. Loyd's confession was not admitted into evidence, and apparently no limiting instructions were given to the jury. Foreshadowing *Bruton,* the Court noted

[5] Justice Stewart restated the majority's holding:

> [T]he underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.

391 U.S. at 137-138 (Stewart, J. concurring).

that Loyd's statements were "of crucial importance" in that they named Douglas as the person who fired the gunshot which wounded the victim, 380 U.S. at 417, and that Loyd's refusal to answer "added critical weight to the prosecution's case in a form not subject to cross-examination," 380 U.S. at 420, quoting from *Namet v. United States,* 373 U.S. 179, 187 (1963).

The *Douglas* Court was also concerned about the jurors' ability to ignore Loyd's confession, even though it had not been placed in evidence. The reading of the statement and Loyd's refusals to answer "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement;" and Loyd's use of the privilege against self-incrimination "created a situation in which the jury might improperly infer both that the statement had been made and that it was true." 380 U.S. at 419. Testimony of law enforcement officers at trial "enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession." 380 U.S. at 420.

A careful reading of *Bruton* and *Douglas* belies the conclusion that either case established a rigid rule barring the introduction of a codefendant's confession which implicates the defendant. Instead, *Bruton* and *Douglas* should be read to establish only that, under the factual circumstances presented, a jury is unable to follow instructions that a confession not in evidence against a defendant is not to be considered as to that defendant.[6] The factual circumstances of *Bruton* and *Douglas*

---

[6] In other words, as noted by the plurality opinion in *Parker v. Randolph,* 442 U.S. 62, 75 n. 7 (1979), *Bruton* is more accurately viewed not as setting out a rule concerning confrontation, but as establishing an *exception* to the long-established presumption that jurors hear and obey limiting instructions. *See Opper v. United States,* 348 U.S. 84, 95 (1954); *Blumenthal v. United States,* 332 U.S. 539, 552-553 (1948). This important presumption was recently reaffirmed in *Marshall v. Lonberger,* 459 U.S. 422, 438 n. 6 (1983).

included a defendant who had not confessed and did not testify at trial, maintaining innocence throughout the proceedings; and the introduction or use of a codefendant's confession wholly inadmissible against the defendant for any evidentiary reason, and which was "devastating" to the defendant or added "critical weight" to the prosecution.

Each case, however, presents a different set of circumstances that requires a reweighing of the principles set forth in *Bruton.* The instant case presents such distinct factual differences from *Bruton* and *Douglas* that it cannot be said to fall within the scope of their holdings. In other words, in this case there clearly was no "*Bruton* violation."[7] The primary factual differences between *Bruton* and *Douglas* and the instant case are: a) Clifford Peele's confession was admissible against respondent Street as a matter of state evidentiary law, and the jury was not required to completely ignore it; b) the respondent "opened the door" by bringing into issue the terms of Peele's confession; and c) Peele's confession "interlocked" with the respondent's confession, added no material weight to the State's case, and was hardly "devastating."

---

[7] As the opinions in *Parker v. Randolph, supra,* make clear, the difference between a "nonviolation of *Bruton*" and a "harmless violation of *Bruton*" may be no more than a semantical tempest in a teapot. The plurality in *Parker v. Randolph* noted that while the Court has said that a *Bruton* violation may be found harmless, it has never actually done so. 442 U.S. at 71 n. 5.

If *Bruton* is limited to its factual context, which the opinion does by its own terms, then a true "violation" of *Bruton* might never be "harmless." If, on the other hand, *Bruton* established a broad constitutional rule of evidence to which there are innumerable exceptions, then the appropriate approach to each case is to make a harmless error determination. *Cf. Parker v. Randolph,* 442 U.S. at 77-82 (Blackmun, J. concurring).

A. Peele's Confession Was Admissible Against the Respondent as a Matter of State Evidentiary Law, and Was Properly Before the Jury for its Consideration.

In both *Bruton* and *Douglas,* the highly damaging confessions of the codefendants were placed before the jury, but the jurors were expected to wholly ignore the confessions when considering the guilt or innocence of the defendants. This is a particularly difficult mental exercise.

> "In joint trials, . . . when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' "

Bruton, 391 U.S. at 131, quoting with approval *People v. Aranda,* 63 Cal.2d 518, 529, 47 Cal. Rptr. 353, 359-360, 407 P.2d 265, 271-272 (1965).

The jurors in the instant case, however, were not faced with that overwhelming task. Peele's confession became relevant when Street claimed that he had been forced to imitate it, and its admission did not violate the rule against hearsay because it was not admitted to prove the truth of the matters asserted therein.[9] The jury was therefore not required to ignore the accomplice's confession, but simply to consider it for a limited purpose, impeachment and rebuttal of the respondent's claims.

Jurors are routinely and frequently called upon to consider evidence for a limited purpose. For example, when the defendant in a criminal case places his or her character in issue,

---

[9] The Tennessee Court of Criminal Appeals so held as a matter of state evidentiary law. (Pet. App. A-7.) *Cf.* Fed. R. Evid. 801(c).

evidence of prior criminal activity is relevant only to character and not to guilt or innocence, and it is an important premise of the jury system that jurors will so limit their consideration of the evidence. *Spencer v. Texas,* 385 U.S. 554, 562 (1967); *Michelson v. United States,* 335 U.S. 469, 484-485 (1948). In both *Harris v. New York,* 401 U.S. 222, 223 (1971), and *Oregon v. Hass,* 420 U.S. 714, 717 (1975), the juries were instructed and apparently entrusted to consider otherwise inadmissible incriminatory statements by the defendants only as the statements bore on their credibility as witnesses, and not as proof of guilt or innocence. To hold, therefore, that the jury in the instant case cannot be presumed to have properly limited its consideration of Peele's confession would have a much broader and more damaging impact on the jury system than *Bruton's* rejection of the presumption on the limited facts of that case.

Furthermore, the legal admissibility of Peele's confession demonstrates clearly why there is no true "confrontation" problem in this case. Because the wording and contents of the confession, and not its truth, had become the relevant inquiry, there would have been no utility in cross-examining Peele on the confession's reliability. Even if the confession had been shown to be completely false or involuntarily made, its relevance and evidentiary weight would have been just as strong on the issue of whether Street was forced to imitate it at the time of his own statement. A similar distinction was made in *Dutton v. Evans,* 400 U.S. 74, 88 (1970):

> [The defendant] was not deprived of any right of confrontation on the issue of whether [his coconspirator] actually made the statement related by [witness] Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confronta-

tion Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard. [Footnote omitted.]

B. The Respondent "Opened the Door" to Introduction of Peele's Confession by Bringing Into Issue the Terms of the Confession.

Unlike the defendants in *Bruton* and *Douglas,* the respondent in the instant case chose to testify and recant his September 17, 1981 confession. His unique claim was that he had been coerced by the sheriff to imitate portions of the confession given by Clifford Peele on the previous day,[9] which explained how he had been able to so accurately describe the burglary and murder without having been there.

With this theory of defense, the respondent affirmatively brought into issue the terms of Peele's confession. Only by reviewing Peele's confession itself could the jurors evaluate the credibility of Street's claim. Since it was the terms of the confession, and not its truthfulness or reliability, which was brought into issue, Peele's testimony would have been irrelevant, and cross-examination of Peele would have shed no light on the issue raised by the respondent.

By defending himself in this manner, the respondent significantly shifted the balance of interests involved, and in fact threatened the reliability of the result of the trial. Until Street took the stand, the State's interest in presenting Peele's confession for any purpose would have been far outweighed by the "substantial threat," recognized in *Bruton,* that the jury would consider the confession for its truthfulness without the

---

[9] This claim pertained to certain portions of his confession. Street testified that he had also deliberately misstated various facts and had simply concocted some portions of the confession.

benefit of testing by cross-examination. When Street made his coerced-imitation claim, which could be credibly disproved only by reviewing Peele's confession, the State's interest in presenting that contrary evidence greatly increased.

"We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass,* 420 U.S. 714, 722 (1975). The ultimate goal of the Confrontation Clause itself is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials...." *Dutton v. Evans,* 400 U.S. 74, 89 (1970); *California v. Green,* 399 U.S. 149, 161 (1970). Therefore when a defendant "affirmatively resorts to [false] testimony in reliance on the [prosecution's] disability to challenge his credibility," *Walder v. United States,* 347 U.S. 62, 65 (1954), "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope [of the constitutional right involved]." *Brown v. United States,* 356 U.S. 148, 156 (1958); *Jenkins v. Anderson,* 447 U.S. 231, 236-238 (1980).

Based on this balancing of interests, the Court in several other cases has held that *Miranda*-violated[10] statements and prearrest silence may be used by the prosecution on cross-examination to impeach a defendant who has testified contrary to those statements or to the inference of guilt that may be drawn from that silence. *Harris v. New York,* 401 U.S. 222 (1971); *Oregon v. Hass,* 420 U.S. 714 (1975); *Jenkins v. Anderson, supra.* The petitioner does not argue here for a broad rule that the defendant who testifies always "waives" confrontation of codefendants who have made incriminatory statements,[11] or that the

---

[10] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[11] Again, the petitioner notes that confrontation of Peele was irrelevant in this case, since it was the contents of Peele's confession, and not his assertions of fact, which were at issue.

prosecution should be permitted to "impeach" a testifying defendant in every case with a codefendant's confession. However, "[t]he shield provided by [the decisions of this Court] cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with" evidence of the true facts. *Harris,* 401 U.S. at 226.

C. The Respondent's Alibi Defense Had Already Been "Devastated" by His Own Confessions and Statements, and Introduction of Peele's "Interlocking" Confession Was Not So Damaging as to Invoke *Bruton*.

A four-Justice plurality[12] of this Court opined in *Parker v. Randolph,* 442 U.S. 62 (1979), that *Bruton* can fairly be limited to the situation in which it arose, and that when the defendant's own confession is before the jury and "interlocks" with the co-defendant's confession, "the constitutional scales tip the other way." 442 U.S. at 74-75 & n. 7. Justice Blackmun concurred in the result, but chose to hold only that if *Bruton* had been violated the violation was harmless error. 442 U.S. at 77-82. Three Justices dissented, 442 U.S. at 81, and Justice Powell did not participate, 442 U.S. at 77. Therefore the Court was unable to resolve the split among the Courts of Appeals on the issue of "interlocking" confessions. 442 U.S. at 68 & n. 4.

Resolution of the *Parker v. Randolph* split is not necessary to a finding that *Bruton* was not violated in the instant case; this case presents facts which remove it even further from *Bruton* than the straight "interlocking" confession situation presented in *Parker v. Randolph*. But the instant case could also serve to clarify *Parker v. Randolph,* since the respondent here had confessed and Peele's confession "interlocked" in such a way that it was no longer "devastating" to the respondent's defense and did not add "critical weight" to the State's case.

---

[12] Justice Rehnquist was joined by Chief Justice Burger, Justice Stewart, and Justice White.

The United States Court of Appeals for the Second Circuit was among the earliest courts to recognize that "interlocking" confessions do not fall within *Bruton*. That court recently summarized the doctrine in *Tamilio v. Fogg,* 713 F.2d 18, 20-21 (2d Cir. 1983), *cert. denied* ____ U.S. ____, 104 S.Ct. 706 (1984).

> This doctrine does not require identity in statements. *United States ex rel. Ortiz v. Fritz,* 476 F.2d 37, 39 (2d Cir.), *cert. denied,* 414 U.S. 1075 . . . (1973). It is sufficient if the confessions are "substantially the same and consistent on the major elements of the crime involved." *United States ex rel. Stanbridge v. Zelker,* 514 F.2d 45, 49 (2d Cir.), *cert. denied,* 423 U.S. 872 . . . (1975). Essentially, to be interlocking, the statements must describe the same crime. *United States v. Fleming,* 594 F.2d 598, 604 (7th Cir.), *cert. denied,* 442 U.S. 931 . . . (1979). The fact that a defendant takes the stand and denies his guilt, thus implicitly repudiating his inculpatory admissions, does not preclude application of the doctrine. *United States ex rel. Dukes v. Wallack,* 414 F.2d 246, 247 (2d Cir. 1969). . . .

The court in *Tamilio* further noted that in a felony-murder situation, a lack of "interlock" on the issue of who actually did the killing is irrelevant, since proof of a defendant's participation in the underlying felony is sufficient to establish his or her guilt. 713 F.2d at 21.

Street's September 17, 1981 confession included admissions that he had helped to plan the burglary of the victim's house (J.A. 353-354), that he knew of the possibility that the victim would be killed (J.A. 354), that he enlisted accomplices (J.A. 355), and that he arranged for the purchase of a rope to be used in connection with the crime (J.A. 356). The confession detailed Street's willing involvement in the burglary, and described how Street had fashioned and tied onto the victim a cloth gag. (J.A. 357-358.) Finally, Street admitted in the confession that he accompanied the other burglars to the tree, and was up in the truck while the hanging took place. (J.A. 358.) Street's June

27, 1982 confession added that Street had placed the rope, or at least the second loop, around the victim's neck. (J.A. 75, 281, 305.)

Peele's confession added nothing of substance to the respondent's own admissions.[13] Peele also related that he and Street had conceived of and planned the burglary, and that Street enlisted help and bought the rope. (J.A. 295-298.) Peele's confession described Street's participation in the burglary and his gagging of the victim, adding only that Street had briefly participated in the initial ambush of the victim before running out of the house. (J.A. 300-301.) Peele's confession also described Street's participation in the hanging, including the fact that Peele *and* Street placed the loops of rope around the victim's neck. Peele added only minor details such as Street helping to carry the victim from the house to the truck and Street helping to lift the victim off the tailgate. (J.A. 302.)

Even if the jury based its verdict on premeditated rather than felony murder, therefore, Peele's confession "interlocked" with Street's statements in a manner precluding any substantial prejudice to Street's defense. Nothing could have been more damning than Street's admissions that he was in the truck and placed at least one loop of rope over the victim's head.

---

[13] Street had already told the jury that Peele's confession "implicated" Street in the burglary and murder. (J.A. 190.)

CONCLUSION

The judgment of the Court of Criminal Appeals of Tennessee should be reversed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General of Tennessee

ROBERT A. GRUNOW
Associate Chief Deputy Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-7087

Attorneys for Petitioner